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ABSTRACT

In common law legal systems, the doctrine of precedent directs appellate judges to search out legal rules articulated in previous cases similar to the present case before making their decision. Although this principle is universally accepted, the extent to which legal rules determine decisions varies, since the rule element and judicial discretion element interact. The judge has four alternatives in application of precedent: strict adherence to precedent, interpretation of precedent, choice of precedent, and creation of new precedent. The judge is guided rather than controlled by legal rules, although judging may not begin with a consideration of legal rules but rather with a vaguely formed conclusion, which a judge afterwards tries to find premises to justify. Most legal scholars who are concerned with legal reasoning have focused upon reasoning as a thought process used to justify a decision and have neglected reasoning as a process aimed at reaching a decision. The two processes are not, however, mutually exclusive. Rhetorical scholars who examine appellate opinions would be wise to develop both a rhetorical and a legal sensitivity for decision making, and to recognize that both legal rules and logical procedures function in the making and justifying of judicial decisions. (HTH)

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Legal Rules and Logical Procedures in Appellate Judicial Decision-Making

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Legal Rules and Logical Procedures in

Appellate Judicial Decision-Making

In appellate judicial decision-making the first task of the judge is to decide how to act with reference to the case before him. While engaged in this process the judge's reasoning is legally prescribed and logically sequenced. This paper explores the potential utility of legal rules and logical precepts for guiding appellate judges in the making and justifying of decisions. In common law legal systems the doctrine of precedent, stare decisis, directs this primary intellectual task of the appellate judge and compels him to ferret out legal rules articulated in previous similar cases.

> The essential difference between a rule of law and a non-legal rule is not...in [the] matter of its operation in the reasoning process, but rather in the peculiarity that it commands acceptance by the adjudicating agency as a basis for reasoning, while in other fields of thinking there is greater subjective freedom to pick and choose between possible variant rules. It is a presupposition of a system of law that a legal tribunal feels and must feel a sense of obligation to employ in the decision of litigated controversies those applicable rules which happen to be stamped as authoritatively legal, irrespective of whether the tribunal agrees with them, and whether or not it would employ them if they were not so authoritative.[1]

Although the principle of stare decisis is universally accepted in common law systems, the actual extent to which legal rules determine particular decisions is another matter; for in addition to the rule element there is also a discretion element inherent in judicial reasoning. It must be remembered that "propositions of law are not based, like those of Euclidean geometry, upon fixed axioms

or postulates, but upon concepts of a linguistic and jurisprudential nature which may be indefinite and change in the course of time."[2] In judicial reasoning the rule element and the discretion element interact and coalesce. Basically the judge has four alternative approaches to the application of precedent in a given case: (1) strict adherence to precedent; (2) interpretation of precedent; (3) choice of precedent; and (4) creation of new precedent.

When the judge deems that there is prima facie similarity between a decided case and the one before him, he follows the precedent. In such situations "the law is so clear that the judges have no discretion."[3]

There are, however, cases in which the judge must extend or restrict the application of an existing rule. Because the categories used in legal decisions are usually ambiguous, they permit the infusion of new ideas applicable to new situations. In these instances "the judge's power of interpretation is in inverse proportion to the clarity and precision of the law."[4] The judge extracts from the precedent the ratio decidendi (the reason for the previous decision) and then determines the direction the ground for the decision is to take in the immediate case.

Furthermore, precedents are numerous and not all precedents have equal authority. Conflicting precedents within a given jurisdiction invite judicial choice of authority. Leeway for choice also arises in situations in which more than one rule is applicable or when there are rules supporting opposing positions. When there

are no decisive precedents for the judge to follow, then he must fashion the law to the case before him. However, courts are not free to anticipate the need for new legal rules; they manufacture them ad hoc, for the particular case in litigation.

Opportunity for the creation of a new precedent also arises when an authoritative rule, though applicable, would yield unjust or undesirable results. In such a case the judge must, through his own reflection, consider the possible consequences and determine whether a new precedent should be created. Any proposed change must be integrated into the framework of existing law. This involves "the fitting of a particular situation into the fabric of legal history."[5] Furthermore, any change must be compelling to be legally justified, and most such changes emanate only from higher courts.

> It is only when someone maintains that what ought to be is different from what is that proof has to be supplied. Proof is incumbent upon the man who asserts that the customary action is unjust, not upon him who acts in accordance with custom. It is presumed that what is, is what ought to be. Only in upsetting a presumption must proof be given. The principle of inertia thus plays an indispensable stabilizing role in social life.[6]

The principle of interia is also an integral part of the doctrine of stare decisis. From one perspective, adherence to precedent provides for degrees of certainty, stability, uniformity, predictability, and reliability, yet from another, its principles are not compelling and could not therefore yield such results. It is the judge, who as the result of his own reflection, decides which case will serve as

authoritative precedent. The Supreme Court has declared that whether stare decisis "shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question."[7] In other words, stare decisis is simply deference to precedent, a moral obligation only. Precedent provides some security and predictability because it is the rule rather than the exception, but exception furnishes the flexibility and adaptability requisite to achieving change in a fluid society. The juristic method of using comparable prior cases as guides to relevant principles and policies for an immediate case preserves the judicial experience of the past while at the same time facilitating legally justifiable change in the present.

Another distinction needs to be made between the judge's application of precedent and his application of statute. Anglo-American courts are subordinate to the legislature. "The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislatures."[8] All courts, excluding the Supreme Court engaged in judicial review, must abide by statutes handed down by the legislature. The principles of a statute must be followed in each case but may be adapted through the judge's power of interpretation. As such, "it is legally unsound for a court to change a legislative rule of law when the legislative intention is clear and unambiguous."[9]

Judicial interpretation of statute supplements legislative action and fills in the vacant spaces of the law. Judge-made innovations, however, are limited. The late Justice Holmes has described this process: "judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions."[10] Thus, judges legislate only between the gaps; they fill in the open spaces of cases for which there are no laws. Whereas legislative rule-making is abstract (to be generally applied), judicial rule-making is concrete (applied to a specific case).

Nevertheless, judges can, as with precedent, neglect to apply statute. "Judges have...the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom."[11]

Judicial decisions are thus circumscribed by authoritatively established legal rules which guide but do not control legal decisions. This is readily apparent when we realize that "[t]he use of a precedent always implies a value judgment, a judgment that similarities between the precedent and the following decision are important and that dissimilarities are relatively unimportant. The application of precedent thus always involves a process of selection and discrimination."[12] Furthermore, "no amount of logical or semantic refining can eliminate the value choice between different policies, whether in the interpretation of a statute or in the application of common law precedent to the case at hand."[13]

The judge's task of discovering the laws applicable to the facts of particular cases are far from trivial. Judicial discretion is, on the one hand, sanctioned and on the other, confined.

> Judicial discretion is the judge's free choice among the various competing legal theories available to him; his psychological prejudices and his hunches, which are undoubtedly large factors in determining his disposition of the case, must nevertheless operate within the range of possible alternatives defined by an exhaustive analysis of the plurality of legal doctrines. Otherwise his decision, although it might temporarily dispose of the case at hand and be law in the sense of an official action done, could not be sustained as a tenable proposition of law. It is in this sense that the precedents are authoritative, restrictive but not compelling.[14]

How legal rules help shape appellate decision-making becomes clearer when we examine the logical sequence of judicial reasoning. Paraductive reasoning (cas pour cas procedure) lies at the very center of the common law legal system. Legal argument originates with the phoros (familiar ratio) that in Case A the court rendered Decision X. The intermediate step is the crucial decision that Case A and Case B (now under consideration) are similar in relevant respects. The theme (unfamiliar ratio) urged therefore is that Case B should be decided as Case A was.[15] Indeed it has been claimed that legal issues may be decidable to the degree that case-by-case analogy is operative.[16] While precedents comprise the basic juridical concepts which are the postulates of judicial reasoning, the question still remains: What principles of selection govern the analogical reasoning process of the appellate judge?

The answer is found in the legal rules of relevance which provide decision procedures for judicial analogical reasoning. The claim that Case A and Case B are analogous is made with reference to the rules established by precedent. In order to select the appropriate precedents the judge must consider what facts or propositions were determined material or immaterial by the court which rendered the original decision. All facts specifically stated to be immaterial must be considered so. When the opinion does not distinguish between material and immaterial facts, then all the facts set forth in the opinion must be considered material unless immaterial on face value. A conclusion based on a fact the existence of which has not been determined by the original court cannot establish a precedent. Conclusions based on hypothetical facts are dicta and therefore do not possess the imprimatur of authority. When the court in its opinion makes pronouncements which are totally off the question, they are obiter dicta and need not be followed. Only legal rules announced by higher courts are binding upon courts of inferior jurisdiction. Courts of co-ordinate jurisdiction give considerable weight to each other's decisions but are not absolutely bound.[17]

Thus the judge is selecting applicable precedent must distinguish between announced law, dicta and obiter dicta, while determining the the ground for the decision. The ratio decidendi can be found according to which facts were admitted as material and which were excluded as immaterial by the court.

These paraductive procedures prescribed by legal rules function, at least for the experienced judge, as a kind of intuitive heuristic, providing the judge with a retrieval system as well as a procedure that invites systematic analysis of the legal problem. This heuristic is essentially regressive. Judging does not begin with a consideration of legal rules. "Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will justify it."[18] Sir Carleton Allen gives us a clue as to how this intuitive regressive heuristic functions in practice.

> [A] judge who is steeped in the law can often discern the principle which governs the situation before he can cite the exact authorities which support it....But this is not to say that the judge is dependent on "hunch," in the sense of inspiration or supra-rational intuition; his mind is working in accordance with long training and experience, and there is nothing at all remarkable in the fact that he can see the picture before he has filled in all the details.[19]

Although the legal prescriptions dictate the logical sequencing of judicial reasoning, the utility of logic per se in the decision-making process has been the source of considerable controversy in legal circles. Most legal scholars who are concerned with legal reasoning have focused upon reasoning as a thought process used to justify a decision. They neglect reasoning as a though process aimed at reaching a decision. This focus upon the justificatory process is usually accompanied by a decidedly narrow view of the role of traditional logic in the law. The general consensus of writers in logic and law was articulated by Joseph Horovitz in his 1972 book, LAW AND LOGIC: A CRITICAL ACCOUNT OF LEGAL ARGUMENT. Horovitz maintains that logic is not

concerned "with the context of discovery of either conclusions or premises, but with the context of justification of the conclusions by the premises."[20] Logic conceived in this way is synonymous with demonstration, and the syllogism is relegated to a kind of "window-dressing" for legal argument.[21] Accordingly, many scholars, such as Boonin, emphasize the syllogism-as-test doctrine. "The legal syllogism properly construed is not a characterization of the process of arriving at, but rather indicates the formal quality of a valid legal decision. The function of the deductive model is not to describe how legal decisions are actually made but to exhibit clearly the structure of the activity when validly performed."[22] Given Aristotle's treatment of the syllogism[23] such current conceptions are but an historical aberration and warrant Mr. Bumble's retort in Oliver Twist, "If the law supposes that, the law is a ass, a idiot."

Contemporary legal theorists who claim that logical deduction is of no assistance in selecting the premises which serve as the starting-points in legal reasoning seem to forget that the selection of preferred events precedes the choice of premises. "The choice between competing starting-points cannot be made by logical deduction: it necessarily involves a reference to the facts and to standards of justice (however covert) in order to decide which analogy will give a 'preferable' result in the instant case."[24] Logic in this light functions to help the arbiter to display and interpret the stated premises and conclusions and to assess their

formal validity according to the rules of logical syntax. This procedure, while significant in the verfication and justification of judicial decisions, provides no clues as to how traditional logic may function in the discovery or invention of judicial decisions. Logic as a mode of inquiry or process of discovery is eclipsed when such a limited perspective is taken. Nonetheless, even legal scholars who ascribe minimal influence to the role of logic grudgingly acknowledge its potential function in the process of investigation.

> In his selection of competing propositions and in his consideration of the propriety of subsuming a particular case under a certain general rule, a judge is not, of course, guided by logic. He is guided by insight and experience. But in his application of the proposition selected, and in his testing of its implications before he adopts it, he uses a deductive form of reasoning in order to discover its potentialities.[25]

In this light, traditional logic is construed in almost classical Aristotelian fashion and the syllogism functions as a search device. Guided by "insight and experience" the judge makes his decision and then fishes around to find the premises which will support it. Thus conceived, the role of traditional logic is not a narrow one. It may function (1) to justify decisions and make them palatable for the legal community of minds assessing them; (2) to help check conclusions tentatively formed; (3) to suggest in classical <u>topoi</u> fashion potential premises; and (4) to assist the judge in organizing his deliberative experience.

A balanced view demonstrating the compatibility of logic as discovery and logic as justification is provided by Ilmar Tammelo.

> Choices made by legal reasoners are reasonable only if they are consistent with the existing legal framework within which these choices are made and if the implications which are explored in arguing for the choices made are tenable also from a formal logical point of view. Making a choice and performing a deduction are not competing or conflicting but complementary intellectual activities.[26] [Emphasis added.]

This perceptive analysis brings us back to our original distinction between the manner in which a decision is reached and the manner in which a decision is justified. Formal logic is of paramount significance to the decision-maker in the justificatory process. "Self-consistency can be achieved only if in any particular step of reasoning the principles of formal logic are strictly observed."[27] The utility of logic does not, however, end here. Whereas Gidon Gottlieb claims that the "canons of construction function...not as rules of guidance but as rules of justification," Tammelo suggests the following qualifier:

> Although canons of construction function mainly as rules of justification, they provide also some guidance to the interpreter as topoi in his paraductive reasoning. They need not be mere expedients of "rationalization" of a choice, but can function also as effective guidelines or "road-signs" for a practicable course of discovery of a right decision. Here the cumulative effect of the canons applicable is important. The relevant points of view which they offer help the interpreter not only retrospectively by rendering the choice made respectable but also prospectively by opening the perspectives of choices of which one can be shown to be justified once it is made the recourse to canons which prove to be the most appropriate for the given case.[28]

Together Gottlieb and Tammelo provide the unified perspective advanced in this paper.

Rhetorical scholars who chose to examine appellate opinions would be wise to employ an eclectic approach and develop a combined rhetorical and legal sensitivity for the decision-making procedures employed by judges. The recognition that legal rules and logical procedures both function in the making and the justifying of appellate judicial decision-making is a first step in acquiring that sensitivity.

FOOTNOTES

1 John Dickinson, "Legal Rules: Their Function in the Process of Decision," University of Pennsylvania Law Review, 79, 7 (May, 1931), p. 856. Also see, Rolf Sartorius, "The Justification of the Judicial Decision," Ethics, 78, 3 (April, 1968), p. 175.

2 A.G. Guest, ed. Oxford Essays in Jurisprudence (London: Oxford University Press, 1961), p. 177.

3 Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), p. 129.

4 Ch. Perelman, Justice (New York: Random House, 1967), p. 29.

5 William Zelermyer, Legal Reasoning: The Evolutionary Process of Law (Englewood Cliffs: Prentice-Hall, 1960), p. 5.

6 Perelman, pp. 9-10.

7 Lloyd K. Garrison and Willard Hurst, The Legal Process (Madison: Capital Press, 1956), p. 179.

8 Cardozo, p. 14.

9 Leonard G. Boonin, "The Logic of Legal Decisions," Ethics, 65, 3 (April, 1965), p. 183.

10 Quoted in Cardozo, p. 69.

11 Cardozo, p. 69.

12 Felix S. Cohen, "Field Theory and Judicial Logic," Yale Law Journal, 59 (1950), p. 246.

13 Wolfgang Friedman, "Legal Philosophy and Judicial Lawmaking," Columbia Law Review, 61 (1961), p. 823.

14 Mortimer J. Adler, "Legal Certainty " Columbia Law Review, 31 (1931), p. 105.

15 Analogy, as Chaim Perelman defines it, is confined to resemblance of ratios, the phoros being the familiar ratio and the theme the unfamiliar. When used for non-decorative purposes as a means of proof, analogy, including metaphor, involves a transfer of value from the known to the unknown. The probative force of the analogy will depend upon how the ratios are presented to the auditor and whether he is able to make the necessary transfer. The probative force of paraductive argument is established in a similar way and the only distinction between argument by analogy and argument by example is that in analogy the theme and phoros belong to different spheres and in example they belong to the same sphere. Edward H. Levi in his classic book, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1948) offers extensive treatment of legal reasoning as "reasoning by example."

16 Jeffrie G. Murphy, "Law Logic," Ethics, 77, 3 (April, 1967), p. 197.

17 For a more extensive explanation of the terms used see Garrison and Hurst, The Legal Process.

18 Jerome Frank, Law and the Modern Mind (Garden City: Anchor Books, 1963), p. 6. For a similar approach see John Dewey, "Logical Method and Law," Cornell Law Quarterly, 10 (1924), p. 23.

19 Cited in Guest, p. 187.

20 (New York: Springer-Verlag), p. 6.

21 David Lloyd, "Reason and Logic in the Common Law," Law Quarterly Review, 64 (1948), p. 480.

22
p. 180.

23
See Robert Price, "Some Antistrophes to the Rhetoric," Philosophy and Rhetoric, 1 (Summer, 1968), pp. 145-164.

24
Julius Stone, The Province and Function of Law (Sydney: Associated General Publications, 1946), p. 139.

25
Guest, p. 188.

26
"Rezensionen: Gidon Gottlieb's The Logic of Choice," Archiv für Rechts-und Sozialphilosophie, (1968), pp. 597-589.

27
Tammelo, p. 597.

28
Tammelo, p. 599.